

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 24, 2009 Session

GARY S. MAYES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 77344 Richard R. Baumgartner, Judge

No. E2008-02777-CCA-R3-PC - Filed March 9, 2010

The petitioner, Gary S. Mayes, appeals from the Knox County Criminal Court's denial of his petition for post-conviction relief. He argues on appeal that his trial and appellate counsel were ineffective. Discerning no error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE, and D. KELLY THOMAS, JR., JJ., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, Gary S. Mayes.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leland Price, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted of especially aggravated sexual exploitation of a minor, *see* T.C.A. § 39-17-1005 (1997), and received a sentence of life imprisonment without the possibility of parole pursuant to Tennessee's repeat, violent offender statute, *see id.* § 40-35-120. This court affirmed his convictions on October 3, 2005, and our supreme court denied his application for permission to appeal on February 21, 2006. *State v. Gary Stephen Mayes*, No. E2004-02344-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Oct. 3, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006). The petitioner filed a "Petition for Writ of Habeas Corpus and or Petition for Post Conviction Relief" on November 9, 2006. After review of his petition, the post-conviction court appointed counsel on November 16, 2006. Post-conviction counsel filed an amended petition for post-conviction relief

incorporating all of the petitioner's original claims and redefining certain arguments. After a hearing, the post-conviction court denied post conviction relief via written order on December 8, 2008, and the petitioner filed a timely notice of appeal.

Facts

We glean the facts regarding the petitioner's conviction from this court's opinion on direct appeal. The fifty-three-year-old petitioner befriended minors R.B. and J.E. outside a picnic area near a Knoxville church on October 5, 2002. *Gary Stephen Mayes*, slip op. at 2. The petitioner invited the girls to a picnic on the church grounds the following day and obtained J.E.'s telephone number. *Id.*

When R.B. and two of her friends, J.E. and Heather Harrison, went to the church [on October 6, 2002], the [petitioner] led them to a recessed area of the grounds near a side entrance to the church, in an area that was partially hidden from view of the surrounding streets and houses. After the girls had finished their picnic, the [petitioner] took their photographs with a disposable camera, instructing them to lift their shirts to reveal their navels. He then began videotaping them with a video camera, focusing on their breasts and pubic areas as they posed, at his direction, draped over a metal handrail and alternately squatted, sat, and stood on both a window ledge and a narrower ledge that formed part of the outside wall of the church.

Id. Heather Harrison's brother, Ryan, notified his mother, Elizabeth Harrison, of the suspicious man, and Elizabeth Harrison then interrupted the videotaping of the girls. *Id.* The petitioner "fled on foot toward the front of the church," and Elizabeth Harrison called 9-1-1. *Id.* The petitioner carried a cooler in one hand and the video camera in his other hand. *Id.* Ryan Harrison followed the petitioner on his bicycle while his mother ran to the petitioner's van and removed its keys. *Id.* When the petitioner reached his van, he no longer possessed the video camera. *Id.* Police officers who responded to Elizabeth Harrison's 9-1-1 call spent approximately 30 minutes searching for the camera. *Id.* "Questioned by police officers without being informed of his *Miranda* rights, the [petitioner] ultimately revealed the location of the camera." *Id.* The tape retrieved from the camera showing the girls in various suggestive poses was introduced to the jury. *Id.*, slip op. at 6.

On appeal, the petitioner argued that the video camera was seized illegally because it was discovered through statements taken from him in violation of *Miranda*. *Id.*, slip op. at 9. This court determined that the police officers would have eventually found the

camera and that, therefore, the camera and videotape were admissible under the doctrine of inevitable discovery. *Id.*, slip op. at 10 (citing *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984)). We also note that the petitioner challenged the sufficiency of the convicting evidence and that the videotape was heavily relied upon to uphold the petitioner's conviction on direct appeal. *Id.*, slip op. at 11-12.

Post-Conviction Proceedings

The post-conviction petition alleged, among other things, that his pretrial and trial counsel failed to move to suppress the videotape in view of the officers' removing the tape from the video camera without a proper warrant. He also alleged that trial counsel failed to properly interview the girls and that he failed to properly investigate the church grounds. Specifically, the petitioner avers that the church security camera would have provided exculpatory evidence. Lastly, the petitioner faults trial and appellate counsel for failing to mount an Eighth Amendment challenge to his sentence of life imprisonment without parole.

In the post-conviction hearing, the petitioner explained that he had three lawyers during his trial and direct appeal. His first counsel ("Counsel I") handled his pre-trial suppression motions, his second counsel ("Counsel II") tried the case, and his third counsel ("Counsel III") represented him on direct appeal.

The petitioner testified that Counsel I failed to "properly investigate[] or properly question[] [the petitioner] or question[] . . . the [S]tate's witnesses." He claimed that Counsel I did not properly "question the evidence" of the videotape presented by the State as the "centerpiece" of their case. He stated that the State obtained the videotape in question on October 6, 2002, by placing him in the back of a police cruiser while law enforcement officers questioned him about a videotape. He stated that he was eventually released from the cruiser and that he retrieved the camera containing the videotape in question from some nearby shrubbery. He testified that law enforcement officers had looked through the shrubbery for 30 or 40 minutes without finding the camera prior to his retrieving it. The petitioner noted that the trial court found that the camera was admissible under the doctrine of inevitable discovery because the officers would have eventually uncovered it.

The petitioner testified that the law enforcement officers then took the camera from him and removed the videotape inside to review the recording. The petitioner stated that he told the officers that he wanted to retain the videotape for his attorney "to show that . . . [he] hadn't done anything wrong." He stated that he never gave the officers permission to open the camera and remove the tape and that the police had no search warrant for the camera. The videotape in the camera was eventually shown to the jury and led to his conviction.

The petitioner testified that Counsel I, during the hearing on the motion to suppress, never argued that the law enforcement officers needed a warrant to remove the videotape from the camera. He testified that Counsel I only raised the issue of whether “it was an illegal search because [his] rights under [*Miranda*] hadn’t been read.” He testified that Counsel I’s refusal to pursue the warrant question regarding the camera led to his obtaining Counsel II for the remainder of the case. He also maintained that Counsel I refused to let him testify during the suppression hearing regarding the police officer’s coercive tactics and that Counsel I failed to make an interlocutory appeal of the issues. The petitioner also made general allegations of Counsel I’s failure to properly investigate, and he said, “I just didn’t feel comfortable with the way he was handling it. I think he should have done a lot more preparation”

The petitioner testified that Counsel II was ineffective by failing to investigate the scene. He stated that despite the petitioner’s raising questions as to whether the videotape had been altered, Counsel II told him that verifying this claim would be too costly. He further testified that he provided Counsel II with funds to hire a private investigator but that Counsel II failed to do so.

The petitioner testified that he asked Counsel II to investigate Heather Harrison, who he claimed operated the video camera. He admitted that he had no way of knowing whether she videotaped the portions of the recording shown to the jury, but he maintained that he only operated a “still camera.” He also stated that Heather Harrison used the camera to videotape the petitioner and that, because the recording used to convict him never showed him, this would have proved that the tape was altered. He further complained that Counsel II failed to interview R.B., who testified for the State at trial, and J.E. The petitioner explained that J.E. would testify that Heather Harrison had taken the video recording and that he only took still photographs.

Petitioner further argued that a security camera that overlooked the church grounds would have shown that “he had not been there to molest any of the children, done anything wrong.” He stated that Counsel II never investigated whether the security camera had recorded any exculpatory evidence.

The petitioner maintained that Counsel II refused to allow him to testify, and he said, “[Counsel II] was very adamant about me not testifying, and he said that if I decided to testify, that he would get off my case.” The petitioner also argued that he was prejudiced by Counsel II’s declining to represent him on appeal.

The petitioner argued that he asked all his lawyers to make an Eighth Amendment argument against his receiving a sentence of life without the possibility of

parole. He maintained that, despite his requests, his various attorneys refused to litigate the issue. He mainly faulted Counsel III, appellate counsel, for failing to present this issue.

The petitioner testified that Counsel III was ineffective in only appealing three of the issues set forth in his motion for new trial. He said, “I asked him to raise the Eighth Amendment issue. I asked him to raise the other issues, as far as the video being altered, tampered evidence, . . . chain of command, chain of evidence. He didn’t . . . raise those issues.”

On cross-examination, the assistant district attorney general asked how the video was altered, and the petitioner responded, “I’m saying that ever who [sic] received that film out of that video camera, some way or another had a magic wand and disappeared me.” He explained that his still photographs depicted the same scenes as parts of the video recording. He argued that this established that he could not have made the video recording and that the recording had been altered.

The petitioner admitted that he had no evidence showing that the security camera at the church was operational and that he could not produce any recordings from the alleged cameras. He also admitted that the trial court informed him that he had the right to testify and that he was ultimately responsible for deciding whether to testify.

Counsel II testified that he represented the petitioner “from the beginning” at sessions court and then was again retained before trial. He testified that he chose not to relitigate Counsel I’s suppression motion because, upon review of the record, he concluded that the judge properly ruled that the video camera was admissible under the theory of inevitable discovery.

Counsel II testified that he went to the church to investigate whether security cameras were present and to familiarize himself with the layout of the scene. He testified that he saw no security cameras. Counsel II explained that he saw no evidence that the videotape submitted into evidence was altered. He testified that even if law enforcement officers had deleted portions of the recordings as the petitioner complained, he did not think it would have affected the jury’s verdict. He added, “I don’t think there’s any way that any lawyer could convince a jury that it was not [the petitioner] making the tape.” He also testified that he never considered whether removing the videotape from the camera was a constitutional violation.

Counsel II maintained that he would never tell a client that he would withdraw his representation if the client insisted on testifying. He also explained that his agreement

to represent the petitioner only extended through the trial and that he did not recall the petitioner's asking him to represent him on appeal.

On cross-examination, Counsel II admitted that he asked questions at trial regarding security cameras at the church "based on what [the petitioner] told [him]." He maintained, however, that he visited the scene and did not locate any security cameras.

Counsel II admitted that the petitioner told him that the girls, and not the petitioner, suggested the picnic and that Counsel II did not interview the girls regarding this claim. He explained that he saw no relevance in who arranged the picnic. He also denied that the petitioner provided him funds to hire a private investigator. Further, Counsel II denied that the petitioner asked him to call Heather Harrison as a witness.

Counsel II maintained that he did not mount an Eight Amendment challenge to the petitioner's life without parole sentence because case law had deemed such sentencing constitutional.

The post-conviction court orally made its findings, which were then reduced to writing and attached to a written order denying habeas corpus and post-conviction relief. The court first determined that "there is no need to obtain a warrant to remove a tape from a camera once [law enforcement officers were] in possession of the camera itself." The court further noted that one can view the contents of a videotape without taking it out of the camera by using the camera's playback function.

Next, the post-conviction court credited the testimony of Counsel II and determined that he properly investigated the scene. The court found that no security camera existed. The post-conviction court further noted that the petitioner provided no evidence showing that the videotape presented at trial had been altered or that he suffered any prejudice from such alterations. The court found the petitioner's claim about Counsel II's preventing him from testifying in his defense was "just the most blatant lie [the court has] ever heard."

The post-conviction court noted that the videotape overwhelmingly proved that the petitioner operated the camera that took the illicit images and that his argument that his attorneys failed to show that Heather Harrison operated the camera was "without merit." Lastly, the court determined that "the constitutionality of life without parole has been litigated and determined to be constitutional."

Issues on Appeal

The petitioner filed a timely notice of appeal, and he argues that his counsel was ineffective on four grounds. First, he maintains that Counsel I and Counsel II were ineffective in failing to challenge the warrantless removal of the videotape from the camera. Secondly, he charges that Counsel II was ineffective in failing to interview witnesses in preparation of his defense. Thirdly, he maintains that Counsel II was ineffective in determining whether a security camera on the church grounds would lead to exculpatory evidence. Lastly, the petitioner alleges that Counsel II and Counsel III performed deficiently by failing to mount an Eighth Amendment challenge to his sentence.

The post-conviction petitioner bears the burden of proving his or her allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

To establish entitlement to post-conviction relief via a claim of ineffective assistance of counsel, the post-conviction petitioner must affirmatively establish first whether “the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases,” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and second that his counsel's deficient performance “actually had an adverse effect on the defense,” *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In other words, the petitioner “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S. Ct. at 2068. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697, 104 S. Ct. at 2069; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

When reviewing a claim of ineffective assistance of counsel, we will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are

made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

The petitioner stresses as his most important issue that his attorneys performed deficiently by failing to litigate whether a search warrant was required to remove the videotape from the camera. He acknowledges that the camera itself was admissible, but he challenges the officers' removing the tape from the camera without a warrant. The petitioner cites *State v. Watson*, 227 S.W.3d 622 (Tenn. Crim. App. 2006), in support of this proposition; however, as the State explains in its brief, *Watson* contradicts the petitioner's argument. In *Watson*, the defendant challenged the validity of a search warrant for the contents of a computer that was obtained through a consensual search of Watson's home. The court determined that a warrant was not required to search the contents of the computer that had been legally seized. *Id.* at 644. The court acknowledged that Watson's computer was subject to Fourth Amendment protection but noted "the touchstone of the Fourth Amendment remains reasonableness." *Id.* (citing *Katz v. United States*, 389 U.S. 347, 359, 88 S. Ct. 507, 515 (1967)). The court held that a search of the contents of the computer, in light of the consent to search the home in which the computer was found, was reasonable and foreseeable. *Id.* In the instant case, the officers had legal possession of the camera, and clearly the petitioner held no reasonable expectation of privacy in the videotape contained within the camera. First, nothing about the camera demonstrated that the petitioner had tried to prevent access to the tape. Second, as noted by the trial court, the videotape could be viewed without being removed using the camera's playback function. With this in mind, we find that any argument along these grounds at the trial level would have necessarily failed. The petitioner cannot prove any prejudice in counsels' failing to present this argument, and, in consequence, he is not entitled to post-conviction relief on this ground.

The petitioner's second assignment of error alleges that Counsel II performed deficiently by failing to interview the girls who were depicted in the videos. The petitioner demonstrated no prejudice suffered by Counsel II's choosing not to interview the children. Counsel II testified that the information he would likely have garnered from such interviews would not have helped the petitioner in light of the clear evidence of the video recording depicting his taping the children and directing them to pose in a sexually-explicit manner. Further, Counsel II testified that he chose not to dispute that the petitioner filmed the victims

in light of the evidence and that he chose instead to argue that the videotaped images did not rise to a violation of law. The post-conviction court credited this trial strategy, and we will not second-guess this tactic in light of the record before us.

The petitioner also argues on appeal that Counsel II failed to investigate alleged surveillance cameras in the church parking lot; however, we credit the findings of the post-conviction court that Counsel II investigated the scene and found no security cameras.

Lastly, the petitioner argues that Counsel II and Counsel III failed to make an Eighth Amendment argument regarding his sentence of life without parole. The petitioner's sentence was a result of Tennessee's repeat violent offender statute. *See* T.C.A. § 40-35-120. This court has determined that "[t]he statute does not violate constitutional provisions against cruel and unusual punishment." *State v. Milton Lebron Byrd*, No. E2006-02619-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Knoxville, April 2, 2008). Further, "the United States Supreme Court has upheld a mandatory sentence of life without the possibility of parole in a case involving a first-time felony conviction for possession of more than 650 grams of cocaine." *Id.*, slip op. at 7-8 (citing *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S. Ct. 2680, 2701 (1991)). Neither trial nor appellate counsel prejudiced the defendant by failing to bring forth this argument.

Conclusion

In light of the foregoing analysis, we uphold the post-conviction court's denial of relief.

JAMES CURWOOD WITT, JR., JUDGE